EB-2011-0040

EB-2011-0041

EB-2011-0042

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c.l5, Schedule B, and in particular, Section 90 thereof;

AND IN THE MATTER OF an Application by Union Gas Limited for an Order granting leave to construct a natural gas pipeline and ancillary facilities in the Township of Ear Falls and the Municipality of Red Lake, both in the District of Kenora;

AND IN THE MATTER OF the Municipal Franchises Act, R.S.O. 1990, c.M.55, as amended; and in particular Sections 8 and 9 thereof;

AND IN THE MATTER OF an Application by Union Gas Limited for an Order approving the terms and conditions upon which the Corporation of the Municipality of Red Lake is, by Bylaw, to grant to Union Gas Limited the right to construct and operate works; to supply gas to the inhabitants of the said municipality; and the period for which such rights are to be granted;

AND IN THE MATTER OF an Application by Union Gas Limited for an Order directing and declaring that the assent of the municipal electors of the Municipality of Red Lake to the by-law is not necessary;

AND IN THE MATTER OF an Application by Union Gas Limited for a Certificate of Public Convenience and Necessity to construct works to supply gas to the inhabitants of the Municipality of Red Lake.

SUBMISSIONS OF THE GRAND COUNCIL OF TREATY #3

Part 1 – Introduction

1. These are the submissions of the Grand Council of Treaty #3 (the "Grand Council") concerning the recent applications Union Gas Limited ("Union") has made to the Ontario Energy Board (the "Board") relating to natural gas facilities and services in the Red Lake Area (the "Red Lake Pipeline Project"). These include applications for Leave to Construct (file number EB-2011-040), a Municipal Franchise Agreement for the Municipality of Red

Lake (file number EB-2011-0041), and a Certificate of Public Convenience and Necessity for the Municipality of Red Lake (file number EB -2011-042).

2. In accordance with the Board's Procedural Order No. 2, these submissions will outline the Grand Council's position on the appropriate scope of the Board's enquiry into issues regarding the Crown's duty to consult with the Grand Council regarding the potential adverse impacts of the Red Lake Pipeline Project on the aboriginal and treaty rights of the Anishinaabe communities the Grand Council represents.

Part 2 – Respective Status of Grand Council of Treaty #3 and Lac Seul First Nation

3. The Grand Council of Treaty #3 is a representative governance body of the signatories of Treaty #3 and is the successor to the traditional Grand Council of the Anishinaabe of the Boundary Waters region that existed before Treaty #3 was signed. As such the Grand Council is a traditional representative government of the entire collective of the signatories of Treaty #3. Its governance body is comprised of most of the Chiefs of the communities making up Treaty #3 and an elected Grand Chief. Its mandate is to represent the interests of the signatories of Treaty #3 with respect to overarching issues, including respect for the rights guaranteed in Treaty #3, respect for the aboriginal rights of the signatories of Treaty #3 and generally to ensure that interests of overarching concern to the entirety of Treaty #3, such as the proper conduct of consultation with the Grand Council and member communities is carried out.

4. The Grand Council has provided evidence in support of the historic role of the Grand Council in the materials filed in support of its initial application and in reply to the submissions made by Union Gas. In this material the detail history of the negotiation of Treaty #3 is set out together with relevant historic documents. What that history shows is that there was a role both for the Grand Council – which led the negotiation of the Treaty – and for the individual bands. The treaty was, in the main, negotiated with the Grand Council who worked together, developed common positions and appointed representative negotiators (see, **Alexander Morris, *Treaties of Canada with the Indians of Manitoba and the Northwest Territories*, pages 44-76**). The Chief of Lac Seul participated in these negotiations and played a key role in leading the negotiations to a successful conclusion

when it appeared that they were about to breakdown (see **page 63**). Indeed the Treaty itself is not with any individual band but is with "Saulteaux Tribe of Ojibway Indians" (see **Treaty #3**). On the other hand, where there were questions as to whether the particular bands had fully agreed with the Treaty or had been represented by the Grand Council, efforts were made to procure adhesions from particular bands (including Lac Seul) to ensure that they were in agreement with the terms of the Treaty (see Morris, at **page 329**). Thus this is not a situation where there is an issue of delegation or dissent as to who constitutes the proper representative of Treaty #3, instead, as will be explained further below, this is a situation where different entities with in the Anishinaabe have different roles and different interests with respect to the interests of the whole the Anishinaabe of Treaty #3 as opposed to interests of particular bands within Treaty #3.

> **Alexander Morris, *Treaties of Canada with the Indians of Manitoba and the Northwest Territories,* (Saskatoon: Fifth House, 1991) at 44-76, 63, 329. Originally published: Toronto : Belfords, Clarke & Co., 1880. [Morris]**

5. Lac Seul is one of the constituent communities represented by the Grand Council and a signatory to Treaty #3. It constitutes a distinct collective within the entirety of the signatories of Treaty #3. As such it has its own traditional territory and a special interest in the lands and rights within that traditional territory. Thus, for example, while the rights contained in Treaty #3 are described as running throughout the tract of land surrendered, there is no doubt that the people of Lac Seul have an elevated interest in the exercise of rights in its traditional territory. This principle has been recognized by the Supreme Court of Canada in ***Mikisew***.

> ***Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),* [2005] 3 SCR 388, 2005 SCC 69 at para 47 [*Mikisew*]. (online)**

6. It must also be noted that there are certain rights guaranteed under Treaty #3 which are clearly specific to each community. In Treaty #3 the Crown committed to set aside reserves. These reserves are set aside uniquely for each of the communities and as such Lac Seul has a unique and distinct interest in lands that are or should be reserve land. Similarly, it should also be understood that there are aboriginal rights (as opposed to treaty rights) which attach or may attach uniquely to Lac Seul in its traditional territory.

7. The Grand Council therefore asserts that the Crown is obliged to consult with both the Grand Council (as the representative of the overarching Treaty #3 signatory group) and each of the constituent communities whose traditional territories may be affected by a proposed development. With regards to the Red Lake Pipeline Project, in addition to Lac Seul, the communities of Grassy Narrows (Asubpeeschoseewagong Netum Anishinabek), Wabaseemong and Wabauskang have also identified concerns and interests that may be at stake. (There may in fact be other communities but this is difficult to determine without a full consultation process.) Ultimately, consultation in each case will have to be calibrated to the nature of the interest at stake and context in which the decision is being taken. Most decisions will have effects that engage both overarching effects as well as specific local effects.

8. In this case the Grand Council has overarching concerns about (1) ensuring that consultation occurs with both the Grand Council and potentially affected Treaty #3 communities (including but not limited to Lac Seul); (2) ensuring that the effect of new development in Treaty #3 Territory is properly assessed in the context of the cumulative effects of other land development in Treaty #3 Territory; (4) ensuring that the provisions of the Treaty are properly understood and applied and, in particular, that the harvesting rights are understood in an appropriately expansive manner and that the surrender provisions are not extended beyond their proper (very limited) reach; (5) that the core promise of the Treaty – that the Anishinaabe would continue to be able to maintain their way of life and to support their community from the land – is respected; and (6) that the Crown adopt appropriate accommodation methods to address the ongoing erosion of Treaty #3 rights, including revenue sharing where lands are being taken from use for traditional purposes.

9. Lac Seul has specific interests in this case, including the right to be consulted about the effect of the proposed activity on the ability of its members to exercise their treaty and aboriginal rights in their territory. Additionally, Lac Seul has the particular right to be consulted with respect to any interference with interests that are completely unique to them. An example of this would the right to be consulted with respect to the claimed reserve near Bruce Lake.

Part 3 – Does the Duty to Consult Arise When the Proponent is a Private Entity?

10. In ***Rio Tinto Alcan***, the Court held that the duty to consult arose with when the Crown contemplated a course of action that had the potential to adversely affect an asserted Section 35 right and the Crown either proposed to carry out the course of action itself or, alternatively, the Crown proposed to make a decision with respect to the contemplated course of action. The question in this case is does the duty to consult arise where the proponent of the proposed action is a private party?

> ***Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council,* 2010 SCC 43, [2010] 2 SCR 650 at paras 43 & 44 [*Rio Tinto Alcan*]. (online)**

11. First, in answering this question it is important to note that the question of whether or not a Crown decision gives rise to the duty to consult is distinct from the question of how and by whom the Crown consultation must be carried out. The law on the duty to consult suggests that the Crown has the flexibility and mechanisms to provide for the duty to consult in a number of different ways and it does not necessarily follow that because it is a particular Crown decision which gives rise to the duty it is that same decision maker that must deal with all aspects of the duty to consult.

> ***Tsuu T'ina Nation v Alberta (Environment)*, 2010 ABCA 137 (CanLII), [2010] 2 CNLR 31 at para 55. (online)**

12. A dramatic example of this is the resolution of the lengthy dispute between British Columbia, Canada and the Musqueam First Nation, where a number of disputes over consultation and accommodation involving different agencies were resolved by British Columbia through legislation enacted in the British Columbia Legislature.

> ***Musqueam Reconciliation, Settlement and Benefits Agreement Implementation Act,* SBC 2008, c6. (online)**
>
> ***Musqueam Reconciliation, Settlement and Benefits Agreement,* between the Musqueam Indian Band and British Columbia (Minister of Aboriginal Rights and Reconciliation), 2008. (online)**
>
> ***Musqueam Indian Band v British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128, [2005] 251 DLR (4th) 717. (online)**
>
> ***Musqueam Indian Band v City of Richmond et al*, 2005 BCSC 1069, [2005] 44 BCLR (4th) 326. (online)**

13. Second, it must also be kept in mind that in almost every duty to consult case, the proponent is a private actor. For example, in ***Haida***, the relevant actors were private logging companies and the Crown's role was limited to decision making. In ***Taku River*** the relevant proponent was a mining company. In ***Dene Tha'*** the proponent who would eventually be carrying out the relevant activities was the consortium of companies proposing to build the Mackenzie Valley Pipeline.

> ***Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73, [2004] 3 SCR 511[*Haida*]. (online)**
>
> ***Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku River Tlingit*]. (online)**
>
> ***Dene Tha' First Nation v Canada (Minister of Environment),* 2006 FC 1354, [2006] FCJ No 1677, [*Dene Tha'*], aff'd 2008 FCA 20, [2008] FCJ No. 444). (online)**

14. In this case the Ontario Energy Board is engaged in making a decision to authorize a private proponent's actions. These actions, as was discussed in Grand Council's earlier submissions, carry with them the potential to adversely affect the Harvesting rights provided for in Treaty #3. While the Ontario Energy Board itself is a quasi-judicial decision maker conducting a hearing (and thus cannot be impressed with the duty to consult itself, see ***Rio Tinto Alcan*** and ***Hydro Quebec***) regard must be had to the fact that it is acting on behalf of the Crown in making a significant public policy decision in the public interest which has the potential to adversely affect Treaty #3 Harvesting rights. Furthermore, it should also be noted that unlike the National Energy Board but like the British Columbia Oil and Gas Commission, the Ontario Energy Board is expressly designated as an agent of the Crown. As such, in considering the Union Gas application the Ontario Energy Board triggers the duty to consult as it is the Crown considering making a decision which furthers a course of action with the potential to adversely affect the Treaty #3 Harvesting rights.

> ***Rio Tinto supra* para 9 at para 60.**
>
> ***Quebec (Attorney General) v Canada (National Energy Board),* [1994] 1 SCR 159, SCJ No. 13 at paras 34 and 35. (online)**
>
> ***Ontario Energy Board Act*, , 1998, SO 1998, c 15, Sch B s 4(4) [*OEBA*]. (online)**

15. It is clear based on the ***Rio Tinto*** decision that the Ontario Energy Board itself likely cannot engage in consultation. However, that does not mean that the Crown does not have to engage in consultation as a result of the Crown decision making process that the Ontario Energy Board has to carry out. The role of the Ontario Energy Board in this situation is one of ensuring that sufficient Crown consultation has been carried out before it makes a decision approving the project. That duty can be discharged by either showing that there is an alternate process for carrying out consultation, which has been followed and is reasonable in all the circumstances, or that the Crown, on an *ad hoc* basis, has in fact carried out sufficient consultation. This is an essential part of ensuring that the Board acts within the bounds of the constitution which requires that there be adequate consultation before a final decision is made.

***Rio Tinto supra* para 9 at paras 55-58.**

16. In considering the questions posed regarding the scope of the Board's inquiry into the duty to consult it is useful to bear in mind the overarching approach the Supreme Court of Canada has articulated with regard to the role of administrative decision-makers dealing with constitutional rights generally and aboriginal and treaty rights generally. As a general rule the Supreme Court of Canada has preferred an approach to administrative decision making that incorporates constitutional considerations (absent clear legislative exclusion) into administrative decision making. That is, constitutional questions are not reserved for judicial consideration after administrative decisions have been made without regard to constitutional issues; instead they are first considered as a part of the administrative decision and then, if necessary, reviewed by the courts.

17. The Supreme Court of Canada has found this easiest to implement in the case of high level boards that can consider questions of law and have broad public interest mandates where the Court has held that the Board can and must decide constitutional questions. In the case of the Charter this point has been recently affirmed in ***R. v. Conway***. In the case of Aboriginal rights this point was made in ***Paul v. British Columbia (Forest Appeals Board)*** and extended to the case of the duty to consult in ***Rio Tinto***. In the case of ordinary administrative decision makers the principle that has been applied in the Charter context is that administrative decision makers are presumptively understood to be required to exercise

their powers within the bounds of the constitution (see ***Slaight Communications***). This principle has been extended to the duty to consult in the recent ***Beckman v. Little Salmon/Carmacks*** decision. In general this reflects a concern on the part of the Supreme Court of Canada to allow effective and early access to processes that can vindicate constitutional rights and to avoid the unnecessary bifurcation of proceedings.

***R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765**

***Slaight Communications Inc. v. Davidson,* [1989] 1 S.C.R. 1038**

Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53, [2010] 3 SCR 103

18. Thus, it is important that the Board not focus its review of the duty to consult issues too narrowly. In ***Kwikwetlem***, the British Columbia Utilities Commission ("the Commission") had to decide whether to issue a Certificate of Public Convenience and Necessity for an electrical transmission line proposed by the British Columbia Transmission Corporation. The British Columbia Court of Appeal emphasized that once it was determined that the Crown did owe the First Nation a duty to consult, it was incumbent on the Commission to properly assess whether that duty had been met:

> By contrast, certification under s. 45 of the Utilities Commission Act is the vital first step toward the building of the transmission line across territory to which First Nations assert title and stewardship rights, one that, for practical reasons, BCTC, BC Hydro and the Commission consider necessarily precedes acceptance of an application for the required ministers' EAC. The legislature has delegated the discretion to opine as to the need and desirability for the construction of additional power transmission capacity to the Commission. Only the Commission can grant permission to enhance a power transmission line.
>
> In these circumstances, in my view, the appellants were not only entitled to be consulted and accommodated with regard to the choice of the ILM Project by BCTC, they were also entitled to have their challenge to the adequacy of that consultation and accommodation assessed by the Commission before it certified BCTC's proposal for extending the power transmission system as being in the public interest. It was not enough for the Commission to say to First Nations: we will hear evidence about the rights you assert and how the ILM Project might affect them.

Kwikwetlem First Nation v. British Columbia (Utilities Commission), 2009 BCCA 68, [2009] 2 CNLR 212 at paras 59 & 60. (online)

19. In this case the decision of the OEB under s. 91 of the ***OEBA*** is the last decision needed in order to authorize the construction of the pipeline and there is no other direct role for the Crown. As a result, any consultation that is to have any chance of affecting the relevant decision making process must take place before the Board makes its decision (see ***Rio Tinto Alcan*** and ***Squamish Indian Band***). This will enable the Board to make a meaningful decision regarding the public interest under s. 96 of the ***OEBA*** including consideration of the results of any consultation between the Crown and relevant First Nations and any accommodations that are either recommended or implemented as a result of such consultations. Indeed, the importance of making the decision after consultation is particularly apparent if consultation between the Crown and the First Nation resulted in proposed accommodations that could be implemented only by either declining the application or imposing conditions on the application. Fundamentally, this flows back to the requirement that in order for consultation to be meaningful (and not just amount to an opportunity to blow-off steam) it must carry with it the potential to affect the outcome of the decision making process. Consultation carried out after a final decision is clearly lacking in this regard.

***Rio Tinto Alcan supra* para 9 at para 35.**

***Squamish Indian Band v British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320, [2004] 34 BCLR (4th) 280 at para 75. (online)**

20. This should be contrasted with the situation under the National Energy Board Act where a decision of the NEB to authorize construction of a pipeline does not take effect until the Governor-General in Council has consented. In that situation the duty to consult may, provided appropriate structures are put in place, be deferred to the Governor-General in Council. In the case of the OEB no such parallel decision making process exists and so consultation must be available before the OEB decision is taken.

21. In this case the Grand Council's position will be that effectively there has been no Crown consultation. The Crown has provided no mechanism either through legislation, regulation or policy to conduct consultation prior to the OEB making its decision. Furthermore, despite

the fact that a number of provincial and federal government agencies knew about the ongoing decision making process, there is no evidence that these agencies in any way attempted to engage in *ad hoc* consultation with the Grand Council.

> **See "Project Summary" in Union's Application for leave to construct, filed February 8, 2011, at para 72. (online)**
>
> **See Union's Response to the Board's Interrogatory #19, submitted April 18, 2011. (online)**

Part 4 – What is the Subject Matter of the Duty to Consult in this Context?

22. The Board has asked whether the inquiry into the adequacy of the Crown's consultation is limited to the direct effects of the proposed pipeline or if the inquiry is broader and can extended to potential induced effects of the pipeline project at Red Lake.

23. As an introductory comment it is worth noting that the induced effects raised in the Grand Council's submissions are clearly within the normal contemplation of the Board in making a determination as to whether or not a proposed pipeline should be approved as being in the "public interest". This is demonstrated by the record in this case where Union, Goldcorp and others rely upon the potential induced effects, such as the ability to expand the Goldcorp facilities and encourage growth and development in the Red Lake area, as potential positive effects which justify approving the application. This clearly suggests that these effects are relevant to the subject matter of this inquiry and properly considered by the Board – indeed, they are relied upon by the proponent. It would be incongruous if such effects were relevant for the purpose of approving the project but not relevant for the purpose of assessing whether or not there had been an adequate consultation in respect of the proposed project.

> **Letter from Thomas Brett of Folger, Rubinoff LLP to Kirsten Walli, Board Secretary (10 March 2011) requesting intervenor status for Goldcorp ["Goldcorp Letter"]. (online)**
>
> **Letter from Phil T Vinet, Mayor of the Municipality of Red Lake to Kirsten Walli, Board Secretary (5 January 2011) expressing support for the Red Lake Pipeline Project ["Red Lake Letter"]. (online)**

24. The reason that "effects" are significant in the consultation analysis is that the significance of the effects is a key part of determining the nature and depth of consultation required in a particular situation. If the effects are minor or insignificant then less consultation is needed while if the effects are more significant, then a greater depth of consultation is required.

***Haida supra* para 11 at para 39.**

25. The case law shows that in considering relevant effects the reviewing body must have regard not only to "direct" effects but also to "indirect" effects – and these include *potential* effects. It should also be noted that in ***Rio Tinto Alcan***¸ the court stated that "a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is 'to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown.'"

***Rio Tinto Alcan supra* para 9 at paras 46 & 47 (citation omitted).**

26. For example, in ***Mikisew***, the Supreme Court of Canada considered the indirect effects of the construction of a winter road around the First Nation's reserve. Though the road would not directly interfere with the reserve lands, it might have affected the quantity and quality of the Mikisew harvest of wildlife, led to fragmentation of wildlife habitat and disruption of migration patterns, caused a loss of vegetation and even increased poaching due to easier motor vehicle access and wildlife mortality due to motor vehicle collisions. Thus, in Mikisew we see not only direct effects (the road footprint) being considered, we see unintentional, indirect effects such as increased poaching opportunities being considered. In ***Taku River Tlingit*** the Court also considered the First Nation's concern that a new road could potentially become a "magnet of future development."

***Mikisew supra* para 4 at para 44.**

***Taku River Tlingit supra* para 11 at para 31.**

27. When the conduct contemplated by the Crown is a strategic decision or approval, the direct and indirect effects of the ultimate result of that decision or approval must be considered. For example, in ***Haida*** the particular decision that was at stake related to the renewal and transfer of a major forest tenure. The tenure itself did not authorize any particular harvesting

activity and further approvals would have to be obtained. The Haida Nation argued that the question of whether or not consultation was required, and the depth of the required consultation, was to be determined with regard to ultimately contemplated activity. In the ***Haida*** case this ultimately contemplated activity was the conduct of forestry at Haida Gwaii and so it was the effect of logging that was considered and not the effect of the tenure renewal and transfer *per se*.

***Haida supra* para 11 at paras 74 & 75.**

28. Similarly, in ***Dene Tha'***, the Dene Tha' challenged the federal government's decision not to engage in consultation with Dene Tha' regarding the establishment of the environmental review process for the Mackenzie Gas Project. The Dene Tha' were concerned both about the project that was under review (the Mackenzie Valley Pipeline) and a project that was not under review (the connection facilities between the Mackenzie Valley Pipeline and the NGTL transmission system in Alberta). The Crown argued that the duty to consult did not arise in this case because the establishment of review process itself had no effect on the relevant Section 35 rights and that it was not until the Crown moved to the stage of considering regulatory approvals that the duty to consult would arise and have to be satisfied and, if necessary, assessed. The Court rejected this submission and instead assessed the necessity and depth of consultation with regard to both the Mackenzie Valley Pipeline and the Connecting Facilities.

***Dene Tha' supra* para 11 at paras 101, 107-110 & 120.**

29. It should also be noted that the Courts have emphasized that it would be wrong in principle to construe narrowly the range of matters considered in evaluating consultation to those matters that are directly related to the activity at issue. In ***West Moberly*** the British Columbia Court of Appeal recently had to consider the question of whether in assessing the conduct of the Crown in consultation the Court had to focus narrowly on the effects of the undertaking in question or if regard should be had to the effects of other historical development in the area. The Court (while differing on other matters) unanimously held that effects had to be assessed in context and that therefore historical interferences with the rights had to be considered to understand the significance of the immediate effects at hand. It is submitted that in this case the effects of the development intended to be induced by this

project and reasonably foreseen to flow from this project must similarly be considered to place the "direct" effects of the pipeline in context.

> ***West Moberly First Nations v British Columbia (Ministry of Energy, Mines and Petroleum Resources)*** **2011 BCCA 247, [2011] B.C.J. No. 942 at para 117, 181 & 241. (online)**

30. The broad approach taken in the identification of relevant effects is most dramatically demonstrated in ***Huu-ay-aht***. In that case the Crown decision at issue was the development of a policy regarding revenue sharing and accommodation in the forestry sector. There was no decision making process or activity directly at stake in the development of the policy which would lead to the authorization of forestry activities. Despite this, the court assessed whether or not the duty to consult was triggered and the depth of the duty required by having regard to extent and nature of the forestry activities that were being considered in other approval processes.

> ***Huu-Ay-Aht First Nation et al. v. The Minister of Forests et al.,*** **2005 BCSC 697 (CanLII), [2005] 3 CNLR 74. (online)**

31. Fundamentally, the duty to consult encompasses consideration of all effects which are reasonably proximate or reasonably foreseeable as flowing from the decision at hand. In many ways this is very much consistent with principles in environmental law where regard is had not only to the direct effects of a project but also to reasonably foreseeable indirect or induced effects.

32. Both the ***Canadian Environmental Assessment Act*** and the ***Ontario Environmental Assessment Act*** require that assessments consider the cumulative or indirect impacts a project may have on the environment. In the environmental law context, courts have interpreted the scope of cumulative and/or indirect impacts broadly.

> ***Canadian Environmental Assessment Act*****, SC 1992, c 37 s 16(1)(a). (online)**
>
> ***Environmental Assessment Act*** **RSO 1990, c E-18 s 6.1(2)(c)(i). (online)**

33. In ***Friends of West Country*** the Federal Court of Appeal considered the scope of the environmental and cumulative environmental effects that must be factored into environmental assessments. It reasoned that cumulative effects under the section 16(1)(a)

of the *Canadian Environmental Assessment Act* "would appear to expressly broaden the considerations beyond the project as scoped" and that "[i]t is implicit in a cumulative effects assessment that both the project as scoped and sources outside that scope are to be considered." The court also considered the impact of an accumulation of seemingly insignificant effects:

> It is not illogical to think that the accumulation of a series of insignificant effects might at some point result in significant effects. I do not say that is the case here. I only observe that a finding of insignificant effects of the scoped projects is sufficient to open the possibility of cumulative significant environmental effects when other projects are taken into account. For this reason, I do not think the insignificant effects finding precludes the application of the cumulative effects portion of paragraph 16(1)(a) or subsection 16(3) in this case. (para 38)

***Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans),* [2000] 2 FC 263, 1999 CanLII 9379 (FCA) at paras 34 & 39. (online)**

34. The following year, in ***Bow Valley**,* the Federal Court of Appeal adopted the Canadian Environmental Assessment Agency's definition of cumulative effects:

> "Cumulative effects" are not defined in the Act. The Agency has defined cumulative environmental effects as "the effects on the environment, over a certain period of time and distance, resulting from effects of a project when combined with those of other past, existing, and imminent projects and activities.

***Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage),* [2001] 2 FC 461, 2001 CanLII 22029 (FCA) at para 40. (online)**

35. There is, naturally, a limit to the projects and development that should be included in the assessment of cumulative effects. The Grand Council does not suggest that the Board should consider projects that are merely speculative or hypothetical. Rather, in this situation, letters submitted to the Board provide clear evidence that the Red Lake Pipeline Project is intended to induce major development in the Red Lake area. The Mayor of Red Lake indicated that the "distribution of Natural Gas will be a catalyst to the growth and development of new businesses and residential development in the Red Lake area and neighbouring communities." Similarly, Goldcorp are the "initial customers" for phase 1 of the Red Lake Pipeline Project and is engaged in a "major expansion of its facilities" in the Red

Lake area. The Grand Council submits that the consideration of the effects of these induced developments is well within the scope of the Board's authority.

Goldcorp Letter *supra* para 19.

Red Lake Letter *supra* para 19.

Part 5 – Can the Crown Impliedly Delegate the Duty to Consult to a Private Proponent?

36. The law is clear that the Crown can, in fact, delegate procedural aspects of the duty to consult to a third party such as the proponent. What is important to note about this however is that the delegation is limited to procedural matters, which would seem to encompass matters such as initial information gathering and the like.

***Haida supra* para 11 at para 53.**

37. Ultimately, however, the substantive duty to consult itself is lodged with the Crown. This means that it is the Crown that has to deal with the substantive issues raised by the duty to consult such as assessing the strength of claim; assessing the potential effects on the aboriginal or treaty rights; considering the information provided by the First Nation; interacting with the First Nation to engage in a dialogue about the rights; and, ultimately, determining what level of consultation is appropriate (which is an iterative process) and what accommodations are appropriate. The vesting of the substantive aspects of the duty to consult in the Crown without the power to delegate that responsibility reflects the logic underlying the Court's determination in ***Haida*** that the duty to consult cannot be and is not imposed on third parties.

***Haida supra* para 11 at para 53.**

38. The principle underlying the duty to consult is the principle that the honour of the Crown is at stake in dealings between aboriginal people and the Crown and it is incumbent upon the Crown to ensure that that duty is upheld.

39. Furthermore, it is the Crown that is charged with the substantive power to create or implement a mechanism for carrying out consultation, if it chooses to do so (see ***Haida***). This, naturally enough, reflects the legal reality that third parties do not have to consult.

Therefore it is up to the Crown to determine how it intends to consult and to then carry consultation out in accordance with that decision, subject to the supervision of the Courts.

40. Both Canada and Ontario have acknowledged this in their respective consultation guidelines. Both sets of guidelines confirm that the ultimate responsibility for consultation lies with the Crown. Furthermore, the guidelines (Canada's in particular) repeatedly make note of the fact that Crown departments are to take the lead and develop its approach to consultation and then co-ordinate with, and perhaps rely on, partners including industry proponents. For example, Canada's guidelines state that "[t]he Crown should clearly communicate what is expected of third parties to industry proponents, Aboriginal groups and various stakeholders". Ontario states that, "[m]inistries will also need to consider whether or how third parties, such as proponents or licensees, should be involved in the consultation process." It cannot be said that Canada or Ontario has followed these guidelines for the Red Lake Pipeline Project. Significantly both of these policies place the onus of designing the consultation on the Crown, which weighs against the idea of implied or implicit delegation of the duty.

> **Department of Indian Affairs and Northern Development, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (Ottawa: Public Works and Government Services Canada, 2011) at page 15 & 20. (online)**
>
> **Ontario, *Draft Guidelines for Ministries on Consultation with Aboriginal Peoples Related to Rights and Treaty Rights* (Ministry of Aboriginal Affairs, 2006) at 10 & 16. (online)**

41. In general the Courts have required that the Crown provide clear structures for dealing with issues involving aboriginal and treaty rights. Thus, for example, a grant of unstructured decision-making power that has the potential to infringe a Section 35 right will be found to be an infringement of a Section 35 right irrespective of how the decision maker chooses to exercise his or her discretion (see ***Adams***). Furthermore, in ***Haida*** the Supreme Court of Canada indicated that the same principle applied in the context of the duty to consult:

> It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts. As noted in R. v. Adams, 1996 CanLII 169 (S.C.C.), [1996] 3 S.C.R. 101, at para. 54, the

> government "may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance". It should be observed that, since October 2002, British Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries' and agencies' operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers.
>
> ***Haida supra* para 11 at para 51.**

42. The delegation of part of the Crown's duty to consult to a proponent raises numerous difficult questions, such as: (1) what has been delegated? (2) how is the proponent to carry out the delegated aspects of the duty to consult? (3) what is the proponent to do with the information once it has carried out its part of the duty? (4) what does the Crown then have to do with the information both in terms of further interaction with the First Nation or Nations and in terms of integrating the results of the consultation into any decision. This last aspect of the duty is particularly difficult when the decision maker is a quasi-judicial Crown agency.

43. While no case law has laid down an explicit answer to the entire question asked by the Board, it is submitted that the following conclusions should be reached:

    a) The Crown can only delegate procedural aspects of the duty to consult (this is a proposition firmly entrenched in existing law); and

    b) Any delegation of the procedural aspects of the Crown's duty to consult should be explicit and done as a part of establishing a clear framework for the duty to consult given the importance of clearly defining what has and has not been delegated and also ensuring that the exercise of discretion is properly structured.

Part 6 – Conclusion

44. The situation facing the Grand Council is very much akin to the situation that arose in ***Dene Tha'***. There the court was struck by the absence of any one Crown representative being ultimately responsible for ensuring that the duty to consult was carried out in a manner consistent with the case law. Justice Phelan found that in such circumstances it cannot be said that the Crown acted appropriately in carrying out the duty to consult.

45. The Board should therefore carry out an inquiry into the adequacy of Crown consultation in relation to the approval of the proposed project. It should have regard to both direct and indirect effects, including the reasonably anticipated development that is to be facility or aided by the gas supply flowing form the Project. To the extent that Union intends to argue that its consultation efforts are part of delegated Crown consultation it should be required to (1) prove the delegation and the nature of the procedural aspects delegated by the Crown and (2) show how this procedural delegation is coordinated with the substantive aspects of the Crown's duty that it cannot delegate.

All of Which is Respectfully Submitted.

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File No. 1018-009

Delivered by: Email
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Ontario Energy Board
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Toronto ON M4P 1E4

Attention: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: Union Gas Red Lake Pipeline Project ("the Red Lake Project" or "the Project")
Board File Numbers: EB-2011-0040, EB-2011-0041 and EB-2011-0042

Attached, please find our submissions.

Yours truly,

Janes Freedman Kyle Law Corporation

Per:

Robert J.M. Janes
RJMJ/et